IN THE

SUPREME COURT OF THE UNITED STATES

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NO. 77-819

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LEE DUDLEY HUDSON and
DENNIS JOSEPH WELLS,

Petitioners

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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LEE DUDLEY HUDSON and
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COMMONWEALTH OF VIRGINIA,

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Petition for a Writ of Certiorari
to the Supreme Court of Virginia

Petitioners, Lee Dudley Hudson and Dennis Joseph Wells petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Virginia.

## OPINION BELOW

Petitioners filed a Petition for Appeal to the Virginia Supreme Court from conviction on February 15, 1977, in the Circuit Court of the City of Richmond, Division I. By Orders of September 12, 1977, the Supreme Court of Virginia without opinion denied the Petition. The Orders are appended to this petition.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1257.

## QUESTION PRESENTED

Whether the convictions of petitioners in the evidence adduced violated their rights to the due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Constitution of the United States, Amendment XIV, Section 1).

Keeping, residing in or frequenting a bawdy place; "bawdy place" defined. – It shall be unlawful for any person to keep any bawdy place, or to reside in or at or visit, for immoral purposes, any such bawdy place. Each and every day such bawdy place shall be kept, resided in or visited, shall constitute a separate offense. In a prosecution under this section the general reputation of the place may be proved.

As used in this Code, "bawdy place" shall mean any place within or without any building or structure which is used or is to be used for lewdness, assignation or prostitution. Virginia Code(1975 Rpl. Vol. §18.2–347.



## STATEMENT OF THE CASE

Petitioners, Dennis Joseph Wells and Lee Dudley Hudson are aggrieved by a final judgment of the Circuit Court of the City of Richmond, Virginia, Division I, entered on February 15, 1977, which judgment convicted them of operating a bawdy house, (§18.2–347 of the Virginia Code.) They were each sentenced to pay a fine of $500.00 and to twelve months in jail, suspended. A timely notice of appeal was filed to the Virginia Supreme Court. Their petitions for appeal to the Virginia Supreme Court were refused by Order of that Court on September 12, 1977.

The warrant against Hudson alleged the bawdy house establishment as Triangle Adult Book Store, 1001 North Boulevard, Richmond, Virginia, with the offense occurring within the last twelve months. (He was also tried for interfering with a police officer, which charge was dismissed.) The warrant against Wells alleged the offense occurred on November 7, 1976.

The three Commonwealth's witnesses were all members of the Morals Section of the Vice Division of the Richmond Bureau of Police.

M.K. Liles, Jr., testified that he was in the establishment, Triangle Book Store, 1001 North Boulevard, on November 5, 1976. He described in detail the physical layout of the inside of the building. In the front room upon entry to the left is a counter with a cash register on top, where the manager could sit. To the right of this there is a pinball machine and several rows of books. In the second room entered by a doorway without a door from the front room, there are approximately fifteen individual rooms, each having a door. Upon entry to these rooms there is a bench in the far wall and a movie projector. The projector operates with a quarter, the door is shut, lights go out and the movie is shown. He stated these rooms are approximately three feet by four feet.

The doorway leading from the front room to the rear is located near the cash register, approximately two feet away. The opening is two and one-half to three feet wide.

Over defense objection (Transcript, p. 9) he stated the

books in the front room depicted males and females engaged in sexual intercourse with nude bodies shown. Over defense objections(Tr. p. 11) Officer Lyles, evidently based upon his own observations of the movies, said these were some showing males and females committing fornication (he did not testify as to how he knew the persons portrayed were not married to each other) and some films showing men committing sodomy on one another.

On November 5, 1976, he stated Hudson was working in the establishment. Upon entry Hudson was behind the cash register. Officer Lyles then testified to a conversation with one Gary C. Farmer. Petitioner objected to the hearsay (Tr. pp. 15-18). The Court overruled the objection providing the Commonwealth could connect up the hearsay (Tr. p. 18). According to Officer Lyles, Farmer approached him on the sidewalk and asked if he wanted to see a movie. Lyles agreed; they walked inside thirty seconds apart. Lyles walked into the back room and Farmer signaled him from one of the booths. Lyles went over; Farmer opened the door; Lyles went in; Farmer closed the door and then grabbed Lyles in the crotch area. (Farmer was arrested for assault.)

In offering to connect up what Farmer then said Officer Lyles said when he went in the second time, Hudson was at the counter, approximately fifteen feet away and that Hudson could see to he was in the back room. He did not see Hudson in the back room that night.

Officer Lyles stated that he had been in the establishment numerous other times and had seen Hudson. He would in the front room, arranging books or making change or coming out of the back room. On those occasions he saw no other employees but Hudson. He saw Hudson close the establishment on numerous nights.

On those previous occasions he stated he had made a morals arrest each time. He had personally observed black and white males (he did not testify to the significance of the race of the persons) walking around the room holding their private organs from outside their pants and rubbing their crotch area and looking at the other individuals.

He arrested petitioner Hudson on November 7th. Testifying to Hudson's statement to him; Hudson was the night manager and that he knew the men who came in and went to the



back room were homosexuals. On cross-examination he said he was testifying from memory and he did not know where his notes were.

Over defense objection (Tr. pp. 27-28), he testified that a William H. Zinn had solicited him for sodomy there on August 6, 1976. Petitioner was then present.

Officer Lyles then related other such solicitation offers. Hudson made a continuing objection (Tr. pp. 27-32).

On cross-examination he went into detail concerning the arrests for solicitation of sodomy. The Zinn and Goodman arrests took place in booths with the door closed, as did the Franklin arrest on September 12, 1976. Likewise, the Farmer arrest on November 5th.

On the night of the August 6th arrest he did not know where Hudson was when the arrest was made but Hudson was in the front room when he came in. None of the persons arrested for soliciting sodomy were employees. Hudson, Officer Lyles said, did not in any way encourage anyone to make such an advance to him. Officer Lyles could offer no evidence that would indicate that before any of these persons made the advances to him behind closed doors that Hudson knew they were going to do so.

Officer W. C. Bailey testified to a September 12, 1976, arrest at the establishment of a man for sodomy solicitation. Petitioner Hudson was then working. Another arrest for the same offense was of a man named Robinson. This arrest took place in an open area of the back room. On October 13, 1976, there was an arrest of a man named Lipe for the same offense. This arrest took place in one of the booths with the door open.

He then testified to what a person could see of the back room from the manager's chair, "the right side of the movie stalls, the far end of them, maybe three or four, perhaps two, and most of the center of the room." (Tr. p. 62).

Officer Bailey also attempted to offer reputation evidence. Over defense objection (Tr. pp. 68, 69), he testified that based upon conversations with persons arrested there and his investigation, the place had a reputation as "a meeting place for homosexuals. It's a place where their activities take place." (Tr. p. 69).

On cross-examination, he said the only business people in the area he talked to concerning the place's reputation were "businesswomen" none of whose names he knew. These "businesswomen" were employees of Relax-arama, an escort service across the street. Previously he had made prostitution and bawdy house arrests at Relax-arama. He indicated that the reputation was based upon conversations with persons arrested at the establishment or persons arrested at Relax-arama.

Officer Bailey stated that he had never seen an act of sodomy or sexual intercourse take place at the establishment.

On the occasions of the previous arrests he did not inform the petitioner of the arrests. He had no evidence to offer that on these occasions the petitioner knew that the solicitations were going to take place.

Lieutenant H.A. Conner testified that he was familiar with the reputation of the Triangle Adult Book Store. According to people who claimed to work in the neighborhood it had the reputation of a "queer joint."(Tr. p. 88). He said he may have talked to six or eight persons but did not know their names. He did not know where in the area they worked. The Court denied Hudson's motion to strike this witness' testimony (Tr. p. 93).

Officer W.C. Bailey testified to only one occasion that was linked to petitioner Wells. On November 7, he went there and petitioner was working. Inside one of the movie booths he arrested a Mr. Phillips for soliciting for sodomy. Although there were numerous other incidents testified to for other dates, the evidence showed this was the only occasion that petitioner was working.

Officer Lyles said petitioner told him after being arrested that he had worked for a year and one half at B & T Adult Book Store on West Broad Street in Richmond and at Triangle.

The Commonwealth concluded its case. The Court overruled petitioner's motions to strike the evidence(Tr. pp. 97 & 105),

The grounds for the motion to strike the Commonwealth's evidence (Tr. pp. 93-105), were that there was no evidence presented to show that petitioners were aware that offers to commit sodomy had taken place on the book store premises.



In their petitions for appeal to the Virginia Supreme Court the petitioners alleged the following as their assignments of error:

1. The trial court erred when it allowed a police officer witness to testify to conversations at the alleged bawdy house between himself and third parties.
2. The trial court erred when it allowed into evidence testimony of a police officer as to what he observed behind closed doors at the alleged bawdy house.
3. The Commonwealth failed to establish by competent evidence the reputation of the alleged bawdy house.
4. The Commonwealth's evidence failed to establish beyond a reasonable doubt that the establishment was a bawdy house.
5. The Commonwealth's evidence failed to establish beyond a reasonable doubt that the defendant knew that illegal practices were being carried on in the establishment.

## REASONS FOR GRANTING THE WRIT

Petitioners contend that the evidence used by the prosecution and allowed into evidence by the trial Judge to convict them of operating a bawdy house was such as to deprive them of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioners do not present any constitutional challenge to the Virginia bawdy house statute, § 18.2–347. Void for vagueness attacks upon a local ordinance identical to the statute have been rejected by the Virginia Supreme Court in Flannery City of Norfolk, 216 Va. 362, 218 S.E. 2d. 730 (1975), and Hensley v. City of Norfolk, 216 Va. 369, 218 S.E.2d 735(1975).

The matter of reception of evidence in criminal prosecutions can have constitutional dimensions. Chambers v. Mississippi, 410 U.S. 284 (1973). The due process claim here pressed by petitioners rests on procedural grou ıds as in United States v. Augenblick, 393 U.S. 348 (1969).

Under the bawdy house statute the "general reputation of the place may be proved." In spite of this language the trial court allowed the prosecution to offer testimony of what

third persons had told him while in or near the premises. This is clearly not "general reputation" evidence and equally so it is hearsay. As such hearsay petitioners had no ability to confront or examine the third parties who supposedly made the statements. In Chambers, supra, this Court voided a state rule of evidence relating to hearsay in a murder prosecution. Similarly, in Bruton v. United States, 391 U.S. 123 (1968), it was held that to deprive an accused of the right to examine the witnesses against him was a denial of his right to due process of law. Even under Virginia decisional law the statements of the third parties were inadmissible hearsay. Cross v. Commonwealth, 195 Va. 62, 77 S.E.2d 447 (1953); Stevens v. Mirabian, 177 Va. 123, 12 S.E.2d. 780 (1941).

In the statute the Virginia legislature had seen fit to carve a small exception to the common law hearsay rule. In a bawdy house prosecution general reputation evidence could be presented. However, the prosecution presented and the trial court allowed evidence of the most ordinary hearsay unrelated to any general reputation evidence. The only evidence that could be considered reputation evidence was that offered by a police lieutenant. No foundation was laid for his testimony. Reputation evidence must be in the community and the witness must know it. The police lieutenant relied upon conversations with six to eight people who he met at a nearby drugstore. He did not know these people and did not know whether they lived or worked in the area of the alleged bawdy house. Such evidence, it is submitted, rises to a level of constitutional deprivation. Procedural due process is not afforded in the basis of this type of evidence. No confrontation of the third parties is possible and passing conversations with strangers passes as reputation evidence.

Very serious questions are also presented by the sufficiency of the prosecutions evidence. State court convictions totally lacking evidentiary support violate federal due process. Adderly v. Florida, 385 U.S. 39 (1966); Gregory v. City of Chicago, 394 U.S. 111 (1969). Furthermore, considerations of due process require the states to satisfy the standard of reasonable doubt in criminal cases. Johnson v. Louisiana, 406 U.S. 356 (1972). Virginia, in its decisional



law has long subscribed to this standard. Johnson v. Commonwealth, 152 Va. 973, 146 S.E. 260 (1929). However, in the present case the state courts have not adhered to that standard.

One of the key elements of proof under the statute is that the accused know of the illegal practices going on in the premises. Warsaw v. City of Norfolk, 190 Va. 862, 58 S.E.2d 884 (1950). Evidence of such knowledge was completely lacking in this matter.

Petitioners are aware that their misdemeanor convictions, with no notoriety and no active jail sentences may be considered pedestrian and commonplace. Yet the Constitution still applies to them in a sex prosecution case. Procedural fairness and due process are the cornerstones of American justice. Criminal convictions in which improper evidence is employed and in which evidence of guilt is lacking should not be allowed to stand. Prosecutors must learn in sex related cases the Constitution still is applicable.

## CONCLUSION

It is respectfully submitted by petitioners that the evidence used against them was a denial of their rights to due process of law under the Fourteenth Amendment and that a writ of certiorari should be granted.

Respectfully submitted,

LEE DUDLEY HUDSON and
DENNIS JOSEPH WELLS

By: R.R. Ryder,
3309 Hull Street
Richmond, Virginia 23224
Counsel for Petitioners

## CERTIFICATE

I hereby certify that three copies of this Petition for a Writ of Certiorari and three copies of the accompanying appendix were each mailed to Anthony F. Troy, Esquire, Attorney General for the Commonwealth of Virginia, Supreme Court Building, Twelfth and Broad Streets, Richmond, Virginia 23219; and to Aubrey M. Davis, Jr., Esquire, Commonwealth's Attorney for the City of Richmond, John Marshall Courts Building,

Richmond, Virginia 23219, Counsel for the Commonwealth of Virginia, on this 7th day of December, 1977.

R.R. Ryder, Counsel for
Petitioners

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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*VIRGINIA:*

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Monday *the* 12th *day of* September, 1977.

The petition of Lee Dudley Hudson for a writ of error to a judgment rendered by the Circuit Court of the City of Richmond, Division I, on the 15th day of February, 1977, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor (Case No. M-5395), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

Record No. 770814

A Copy,

Teste:

Howard G. Turner, Clerk

By: Richard R. Baird
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 12th day of September, 1977.

The petition of Dennis Joseph Wells for a writ of error to a judgment rendered by the Circuit Court of the City of Richmond, Division I, on the 15th day of February, 1977, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

Record No. 770813

A Copy,

Teste:

Howard G. Turner, Clerk

By: Richard R. Bonish
Deputy Clerk